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SUNDRA RAJOO NADARAJAH v. LEADERONOMICS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[WRIT SUMMON NO: WA-23CY-32-07-2022]
30 JUNE 2023

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Abstract – *In deciding whether a defendant is responsible for an anonymous defamatory publication, a critical question to be asked is whether the defendant has some motive to harm the plaintiff. The courts will test the evidence against two propositions; that the defendant has some motive to harm the plaintiff and that the person responsible may have been a third party.*

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TORT: *Defamation – Poison pen letter – Poison pen letter went viral and led to series of events that impacted life and career of claimant – IT forensic experts hired to trace author and publisher – Findings led to alleged tortfeasors – Whether alleged tortfeasors either jointly and/or severally wrote and published poison pen letter about claimant – Whether metadata analysis could be relied on – Whether presumption under s. 114A(3) of Evidence Act 1950 rebutted*

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The present trial arose out of a notorious poison pen letter which went viral *via* social media, email and WhatsApp. The poison pen letter led to a series of traumatic events which severely impacted the life and career of the plaintiff, who was a prominent and well-respected arbitrator and, at that time, the Director of the Asian International Arbitration Centre ('AIAC'). The plaintiff was arrested by the Malaysian Anti-Corruption Commission ('MACC') at the Kuala Lumpur International Airport, spent a night in the MACC lockup and was subsequently charged with offences related to the contents of the poison pen letter. He also 'resigned' as the Director of the AIAC. The plaintiff hired IT forensic experts to trace the perpetrator(s) and author(s) of the poison pen letter. Based on the IT forensic experts' conclusions, the plaintiff filed a suit against the defendants for defamation arising out of the contents and publication of the poison pen letter. The second defendant was formerly employed by the AIAC before he was employed by the first defendant. In the time of the second defendant's employ with the AIAC, he reported directly to the plaintiff and had wide access to and was privy to information and documents relating to the AIAC and the plaintiff, confidential and otherwise. The second defendant had, however, passed away and the plaintiff discontinued his suit against the second defendant. The plaintiff submitted that the irresistible conclusion and/or inference was that the defendants were jointly and/or severally

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responsible and liable for the authorship and publication of the poison pen letter as: (i) the second defendant had ended his employment with the AIAC on bad terms; and (ii) the first defendant had failed, refused and/or neglected the plaintiff's request confirmation of particulars relating to the second defendant's employment with the first defendant and access to the second defendant's computer during the second defendant's employment with the first defendant. The plaintiff relied on s. 114A of the Evidence Act 1950 ('Act'). The first defendant denied authoring, publishing, circulating or disseminating the poison pen letter. The first defendant contended that: (i) the reference to 'Leaderonomics' in the forensics examination could be a default setting or default reference, editable and did not support the conclusion that the first defendant was the author of the poison pen letter; (ii) the poison pen letter contained information that the first defendant could not have possibly or reasonably have knowledge of or known. Further, the first defendant had nothing to gain whatsoever by publishing, circulating or disseminating the poison pen letter; (iii) the first defendant had no basis or motive to be involved whether jointly or severally in the authoring, publishing and/or disseminating the poison pen letter; and (iv) the second defendant was given a work laptop by the first defendant but it did not have control nor exercised any control of the said work laptop.

Held (dismissing suit):

(1) The poison pen letter was not issued by the first defendant, was not on the first defendant's website nor issued on the first defendant's letterhead. There was also no evidence that the poison letter was issued by any of the first defendant's employees for and on behalf of the first defendant. Neither was it proven that it was the late second defendant who issued the poison pen letter. Even if it was the late second defendant who issued the poison pen letter (which was not proven), it was not issued for and on behalf of the first defendant. (paras 62, 65, 66 & 67)

(2) The plaintiff's defamation suit against the first defendant was premised solely on the fact that the 'author' and 'last modified by' metadata properties of the Microsoft Word copy of the poison pen letter, which was titled MACC.docx, referred to a username 'Leaderonomics' which was the company name of the first defendant. Metadata analysis could be manipulated and could not properly be regarded as reliable evidence supportive of either side's case in a court dispute. The expert findings showed that the metadata properties of the MACC.docx had little to no value in proving the authorship and publication of the MACC.docx as it could not identify the person who typed and/or published the poison pen letter. (paras 79, 94 & 102)

(3) The presumption invoked by the plaintiff was s. 114A(3) of the Act. The pertinent issue was what was the material time for custody or control of the computer for the presumption under s. 114A(3) of the Act to apply

to a defendant. The presumption under s. 114A(3) of the Act could be invoked against a defendant who had custody or control of the computer at any point in time as long as the publication originated from that computer. On this interpretation, the presumption of publishing could be rebutted by a defendant showing he did not have custody or control of the computer at the material time of the publication of the defamatory email. The first defendant had proven that the second defendant had custody or control of the laptop at the time of his alleged publication of the poison pen letter. Therefore, the first defendant had successfully rebutted the presumption of publication under s. 114A(3) of the Act. (paras 116, 117, 120 & 122)

Case(s) referred to:

A Labour Inspector of The Ministry of Business, Innovation And Employment v. Basra & Khella Ltd (New Zealand – BC202064023) ***(refd)***

Ahmad Abd Jalil v. PP [2015] 5 CLJ 480 HC ***(refd)***

Amanatidis & Anor v. Darmos [2011] VSC 163 ***(refd)***

Big Man Management Sdn Bhd v. Tenaga Nasional Bhd [2020] 8 CLJ 27 HC ***(refd)***

Boyapati and Others v. Rockefeller Management Corporation And Others [2008] FCA 995 ***(refd)***

Christopher Grant v. Teh Beng Leong & Anor [2019] 1 LNS 1922 HC ***(refd)***

Commonwealth v. Davis Samuel Pty Ltd And Others (No 7) [2013] ACTSC 146 ***(refd)***

Croftcall Ltd v. Morgan And Another [2008] All ER (D) 152 ***(refd)***

Dato' Seri S Samy Vellu v. Penerbitan Sahabat (M) Sdn Bhd & Ors (No 2) [2005] 3 CLJ 493 HC ***(refd)***

Financial Information Services Sdn Bhd v. Hj Salleh Hj Janan [2012] 8 CLJ 885 FC ***(refd)***

Ifcon Technology Sdn Bhd & Ors v. Luqmanul Hakim Abd Rahim [2022] 1 LNS 1533 HC ***(refd)***

Lysko v. Braley [2006] CanLII 17253 ***(refd)***

Maui Ashley Solomon v. David James Prater [2021] NZHC 481 ***(refd)***

Mrs Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors [1978] 1 LNS 125 FC ***(refd)***

Pan v. Cheng; Zhou v. Cheng [2021] NSWSC 30 ***(refd)***

Peguam Negara Malaysia v. Mkini Dotcom Sdn Bhd & Anor [2021] 3 CLJ 603 FC ***(refd)***

PP v. Razis Awang [2020] MLJU 132 ***(refd)***

Raja Syahrir Abu Bakar & Anor v. Manjeet Singh Dhillon & Other Appeals [2019] 4 CLJ 301 CA ***(refd)***

Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee [2019] 3 CLJ 729 FC ***(refd)***

Richard Alan Parsons v. Elizabeth Garnett & Ors [2022] EWHC 3017 ***(refd)***

Saharudin Abd Jabar v. Bank Islam Malaysia Bhd [2015] 1 LNS 1059 HC ***(refd)***

Small Medium Enterprise Development Bank Malaysia Bhd v. North South Speed Sdn Bhd & Ors & Another Case [2020] 1 LNS 1724 HC ***(refd)***

Stanislaus J Vincent Cross v. Ganesan Vyramutoo & Anor [2020] 10 CLJ 263 HC ***(refd)***

Stemlife Bhd v. Mead Johnson Nutrition (Malaysia) Sdn Bhd & Anor [2013] 1 LNS 1446 HC ***(refd)***

Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC ***(refd)***

Tan Ah Hong v. CTOS Data System Sdn Bhd [2016] 1 LNS 90 CA ***(refd)***
Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***
Thong King Chai v. Ho Khar Fun [2018] 1 LNS 374 HC ***(refd)***
Triplex Safety Glass Co Ltd v. Lancegaye Safety Glass (1934) Ltd [1939] 2 All ER 613 ***(refd)***
Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***
WLP Industrial Solutions (M) Sdn Bhd v. KL-Kepong Rubber Products Sdn Bhd [2011] 1 LNS 818 HC ***(refd)***
Yitai (Shanghai) Plastic Co, Ltd v. Charlotte Pipe And Foundry Co [2021] SGHC 198 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 8
Evidence Act 1950, ss. 103, 114A(1), (3)

For the plaintiff - Edward Kuruvilla, TJ Lee & Soh Lip Shan; M/s Cheok Ng Lee Law Chambers
For the 1st defendant - HR Dipendra, Tong Joe Jye & Wan Sarah Irdina (Pupil in Chambers); M/s Ramesh Dipendra Jeremiah Law

Reported by Lina E

JUDGMENT

Leong Wai Hong JC:

Introduction

[1] This is a defamation trial heard over four days from 10 April 2023 to 13 April 2023. Oral submissions by counsel were held before me on 23 June 2023. The decision was reserved. I delivered the decision with full grounds on 30 June 2023.

[2] The trial arose out of a notorious poison pen letter or surat layang in its more colourful Malay language ("poison pen letter"). Unlike the olden day's version of snail mail with its more limited and slower circulation *via* the postal system, the poison pen letter went viral *via* social media, email and WhatsApp. Recipients, local and overseas, received them fast and furious.

[3] The poison pen letter led to a series of traumatic events which severely impacted the life and career of the plaintiff who is a prominent and well-respected arbitrator, and at that time the Director of the Asian International Arbitration Centre ("AIAC") based in Kuala Lumpur, Malaysia.

[4] He was arrested by the Malaysian Anti-Corruption Commission ("MACC") at the KL International Airport upon his return from Zurich, Switzerland, spent a night in the MACC lockup and was subsequently charged with offences related to the contents of the poison pen letter. He also "resigned" as Director of the AIAC.

[5] The background facts on his arrest and charge can be found in the grounds of judgment of the Federal Court (*Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLRA 1; [2021] 5 MLJ 209) where the Federal Court held that he enjoyed immunity from criminal proceedings by virtue of his position as director of the AIAC.

[6] The poison pen letter is dated 28 September 2018, written in English and unsigned. (See amended statement of claim appendix A). There is another version of the poison pen letter dated 1 October 2018 with similar contents which were also sent anonymously in hard copy to the MACC on 8 October 2018.

[7] Understandably, the plaintiff left no stone unturned to trace the perpetrator(s) and author(s) of the poison pen letter. He hired two IT forensic experts, one based in Kuala Lumpur and the other in Singapore to undertake a digital forensic review on the Microsoft Word version of the poison pen letter ("MACC.docx") to ascertain the author(s).

[8] Based on his two IT forensic experts' conclusions, he subsequently filed a suit against the two defendants here for defamation arising out of the contents and publication of the poison pen letter.

[9] The first defendant is a company incorporated in Malaysia with its registered address at 910 (Suite), Block B, Phileo Damansara 2, 15 Jalan 16/11, Off Jalan Damansara, Petaling Jaya, 46350 Selangor Darul Ehsan who is and was in the business of providing human capital development services including training and consultancy.

[10] The second defendant is a Malaysian citizen who was formerly employed by the AIAC. After he left AIAC, he was employed by the first defendant on 2 July 2018. He left the first defendant on 16 May 2019 and passed away on 31 August 2022.

[11] On 20 October 2022, at a case management, the plaintiff has discontinued his suit against the second defendant with no order as to costs. This is because under s. 8 of the Civil Law Act 1956 on the death of a person, causes of action for defamation subsisting against him shall not survive against his estate. (*Dato' Seri S Samy Vellu v. Penerbitan Sahabat (M) Sdn Bhd & Ors (No 2)* [2005] 3 CLJ 493; [2005] 5 MLJ 539 paras [30] to [32] Abdul Malik Ishak J).

[12] A unique feature of the suit filed is the fact that the plaintiff is not suing the first defendant for vicarious liability for the tort of defamation committed (If any, which is not proven) by the late second defendant as its employee or that the late second defendant was authorised by the first defendant to write and/or publish the poison pen letter.

[13] Instead, the plaintiff pleaded that the first defendant had, jointly and/or severally with the second defendant, written and/or published and/or caused to be written and/or caused to be published the poison pen letter against the plaintiff. (See encl. 37 amended statement of claim dated 22 February 2022 at paras. 15 and 23).

[14] Questions immediately arise as to whether the first defendant, a company which is an inanimate entity, can in the absence of artificial intelligence tools like ChatGPT which is not the pleaded case here, write and publish the poison pen letter against the plaintiff, without the input of a human.

[15] At the onset of this trial, I had stressed to counsel for the plaintiff this conceptual difficulty. But counsel was confident it was not a bridge too far. This hurdle will have to be cleared by the plaintiff to succeed in his defamation suit against the first defendant.

Court Pleadings

The Pleaded Case Of The Plaintiff

[16] The pleaded case of the plaintiff in his amended statement of claim (encl. 37) where relevant to the two agreed issues to be tried is reproduced *verbatim* below.

[17] During the period January 2016 to March 2018, the second defendant was employed by the AIAC in the following capacities:

(i) case counsel from January 2016 to November 2016; and

(ii) senior case counsel from December 2016 to March 2018.

[18] In the time of the second defendant's employ with the AIAC, the second defendant reported directly to the plaintiff and had wide access to and was privy to information and documents relating to the AIAC and the plaintiff, confidential and otherwise. Specifically, and to this end, the plaintiff contends and shall contend that the second defendant was, at all material times, privy to all matters relating to the plaintiff's renewal of his tenure as the director of the AIAC for years 2016 to 2019.

[19] After the second defendant left AIAC's employment in March 2018, the second defendant was still in touch with a number of people from the AIAC, including the plaintiff's then personal assistant, Carol Yee, all of whom continued to have access and continued to be privy to information and documents relating to the AIAC and the plaintiff, confidential and otherwise.

Nexus/Affiliation Between The First Defendant And The Second Defendant

[20] The plaintiff contends and shall contend that the first defendant and the second defendant (hereafter collectively "the defendants") were, at all material times relevant to this claim, affiliated parties, including but not limited to, in the following ways:

(i) after leaving the AIAC, the second defendant was employed by the first defendant for the period 2 July 2018 to 16 May 2019; and

(ii) amongst the roles held by the second defendant during his employ with the first defendant was head of legal.

[21] During the second defendant's employ with the first defendant, the second defendant was granted access to and was using the facilities of the first defendant, including but not limited to computers belonging to the first defendant.

Publication Of Poison Pen Letter To Third Parties And Wide Circulation

[22] On or about 28 September 2018, the defendants had, jointly and/or severally, published and/or caused to be published the poison pen letter against the plaintiff (who was referred to by his name) which was addressed to the Chief Commissioner of MACC at the material time, Dato' Sri Mohamad Shukri bin Abdull.

[23] The poison pen letter was also carbon copied to:

(i) the Attorney General of Malaysia at the material time, Tan Sri Tommy Thomas;

(ii) the Inspector-General of Police of Malaysia at the material time, Tan Sri Dato' Sri Mohamad Fuzi Harun;

(iii) the President of the Malaysian Bar at the material time, Mr George Varughese;

(iv) the Minister of Foreign Affairs at the material time, Dato' Saifuddin Abdullah;

(v) the Director General of the Legal Affairs Division at the material time, Datuk Seri Jalil Marzuki;

(vi) the Senior Deputy Secretary-General in the Prime Minister's Office at the material time, Tan Sri Dato' Seri Mohd Zuki Bin Ali; and

(vii) the Secretary-General of the Asian-African Legal Consultative Organization (hereafter "AALCO") at the material time, His Excellency Professor Dr Kennedy Gastorn.

[24] In addition to the above, the plaintiff contends and shall contend that soft copies of the poison pen letter were also widely and maliciously circulated and/or disseminated by way of digital and/or electronic means including but not limited to by way of WhatsApp, electronic mail and social media, nationally and internationally. Specifically, the poison pen letter was widely circulated to:

(i) members of the legal fraternity, nationally and internationally;

(ii) the plaintiff's colleagues at the AIAC who were, at all material times relevant to this claim, officers and/or employees of the AIAC;

(iii) the plaintiff's friends and family members; and

(iv) domestic and international members of the alternative dispute resolution, legal and construction industries.

Specific Defamatory Words In Poison Pen Letter

[25] In the poison pen letter, the defendants, jointly and/or severally, deliberately, falsely and with malicious intent wrote, published, caused to be written and/or caused to be published the following defamatory words against the plaintiff (who was referred to by his name), which are reproduced below in *verbatim*:

(a) "Corrupt Practices And Abuse Of Power By The Director Of The Asian International Arbitration Centre."

[Bahasa Malaysia Translation: "Amalan Rasuah Dan Penyalahgunaan Kuasa Oleh Pengarah Pusat Timbang Tara Antarabangsa Asia"];

(b) "It is to be noted that Datuk Sundra Rajoo's initial contract ended in February in 2016, he had run the centre on its own, without any mandate or authorisation not the renewal of his contract. This went on until he was granted a back dated contract in 2017."

[Bahasa Malaysia Translation: "Perlu diingati bahawa kontrak awal Datuk Sundra Rajoo telah tamat pada Februari 2016, beliau telah mengendalikan Pusat tersebut secara sendiri, tanpa sebarang mandat atau kebenaran ke atas pembaharuan kontraknya. Perkara ini berterusan sehingga beliau diberikan kontrak undur tarikh dalam tahun 2017."];

(c) "In order to obtain his contract Datuk Sundra Rajoo, had then extended several personal favours and had unlawfully used the funds granted by the Malaysian Government to in order to obtain the favour of the then Law Minister Dato' Sri Azalina Othman Said to obtain his contract. The terms of his contract were also made extremely one sided in favour of Datuk Professor Sundra Rajoo."

[Bahasa Malaysia Translation: "Untuk mendapatkan kontraknya, Datuk Sundra Rajoo telah memberikan beberapa bantuan peribadi dan telah menggunakan dana yang diberikan oleh Kerajaan Malaysia secara salah untuk mendapatkan bantuan Menteri Undang-Undang ketika itu, Dato' Sri Azalina Othman Said untuk mendapatkan kontraknya. Terma-terma kontraknya juga telah dibuat secara berat sebelah memihak kepada Datuk Profesor Sundra Rajoo."];

(d) "Such personal favours include the payment for the expenses incurred by the then Law Minister Dato' Sri Azalina Othman Said, which include the following: 1) Hotel stays and dining at the Majestic Hotel, including alcoholic beverages running in thousands from the period of 2016/2017 (2) Expenses in term of car rental and flight tickets for her officers for personal trips guised as official trips to UK. 3) A gift of champagne bottle worth RM5,000 paid by the AIAC from Datuk Sundra Rajoo to Dato' Sri Azalina Binti Othman Said (4) Payment for the Special Officers Danesh

Chandran and Thiyagu Ganesan for air ticket and travels expenses for trips not related to AIAC. (5) Lavish luxurious dining and alcoholic beverages for the Special Officers Danesh Chandaran and Thiyagu (6) Payment and bearing of cost for the Legal Profession Blueprint Committee, Consultative Organisation, which is not related to the AIAC resulting in abuse of funds. (7) Paying the salary of the staff of the Ministers Office under the pretext of being the AIAC staff."

[Bahasa Malaysia Translation: "Bantuan peribadi tersebut adalah termasuk bayaran untuk perbelanjaan yang ditanggung oleh Menteri Undang-Undang ketika itu Dato' Sri Azalina Othman Said, termasuk yang berikut: (1) Penginapan dan jamuan di Hotel Majestic, termasuk minuman beralkohol yang berjumlah ribuan ringgit dari tempoh 2016/ 2017. (2) Perbelanjaan bagi tujuan penyewaan kereta dan tiket penerbangan untuk pegawainya atas perjalanan peribadi yang disamarkan sebagai perjalanan rasmi ke UK. (3) Hadiah sebotol champagne bernilai RM5,000 yang telah dibayar oleh AIAC daripada Datuk Sundra Rajoo kepada Dato' Sri Azalina Binti Othman Said (4) Bayaran kepada Pegawai Khas Danesh Chandran dan Thiyagu Ganesan untuk tiket penerbangan dan perbelanjaan perjalanan untuk perjalanan yang tidak berkaitan dengan AIAC. (5) Jamuan mewah dan minuman beralkohol untuk Pegawai Khas Danesh Chandaran dan Thiyagu. (6) Bayaran dan tanggungan kos untuk Jawatankuasa Pelan Tindakan Profesion Undang-Undang, Organisasi Perundingan, yang tidak berkaitan dengan AIAC dan mengakibatkan penyalahgunaan dana. 7) Membayar gaji kakitangan Pejabat Menteri atas alasan sebagai kakitangan AIAC."];

(e) "In lobbying for the extension of his contract beyond February 2019, Datuk Professor Sundra Rajoo has abuse the fund granted for the development of the AIAC and has used them to grant certain personal favours to the current Law Minister, Liew Vui Keong, which includes:

(1) Leased car (Honda Civic) and driver for the personal use of the Minister's child studying in Kuala Lumpur. (2) Several hotel stays in St Regis Kuala Lumpur for the use of the Minister's family visiting from Sabah (3) Renting of a luxury car for the use of the Minister upon his appointment."

[Bahasa Malaysia Translation: "Dalam usaha melobi untuk melanjutkan kontraknya selepas Februari 2019, Datuk Profesor Sundra Rajoo telah menyalahgunakan dana yang diberikan bagi tujuan pembangunan AIAC dan telah menggunakannya untuk memberikan bantuan peribadi tertentu kepada Menteri Undang-Undang semasa, Liew Vui Keong, termasuk: (1) Sewaan kereta (Honda Civic) dan pemandu untuk kegunaan peribadi anak Menteri tersebut yang sedang belajar di Kuala Lumpur. (2) Beberapa penginapan di Hotel St Regis Kuala Lumpur bagi tujuan kegunaan keluarga Menteri tersebut yang berkunjung dari Sabah. (3) Penyewaan kereta mewah untuk kegunaan Menteri tersebut selepas pelantikannya."];

(f) "Datuk Professor Sundra Rajoo is also using his connection with the current law minister to evade repercussions as a result of the Datuk Professor Sundra Rajoo's actions which are in excess of his authority and abuse of his immunity. This includes to evade investigation as stipulates

by the Court of Appeal Judge YA Datuk Hamid Sultan Bin Abu Bakcer in his dissenting judgment in the case of *Lead Modulation Sdn Bhd v. PCP Construction Sdn Bhd* (Civil Appeal No: W-02(C)(A)-505-03/2017."

[Bahasa Malaysia Translation: Datuk Profesor Sundra Rajoo juga telah menggunakan hubungannya dengan Menteri Undang-Undang semasa untuk mengelak kesan dan akibat daripada tindakan Datuk Profesor Sundra Rajoo yang melampaui kuasanya dan menyalahgunakan kekebalannya. Ini termasuk mengelak siasatan seperti mana telah ditetapkan oleh Hakim Mahkamah Rayuan, YA Datuk Hamid Sultan Bin Abu Bakcer dalam penghakiman menentang beliau dalam kes *Lead Modulation Sdn Bhd v. PCP Construction Sdn Bhd* (Rayuan Sivil No.: W-02(C)(A)-505-03/2017.];

(g) "Datuk Professor Sundra Rajoo has also to his whims and fancies. Under his instruction the AIAC has erected and electronic billboard for the purposes of advertisement for the purposes of generating income for the Centre. This is in violation of the status of the Bangunan Sulaiman as a heritage building. Datuk Professor Sundra Rajoo has also been advised by a certain Mr Gan from Ledtronics Sdn Bhd to bribe the officers of DBKL for the approval. While now receiving backlash for the installation of the electronic billboard, Datuk Professor Sundra Rajoo is attempting to use the influence of the current Law Minister to interfere in the investigation and obstruct justice and meddle with the affairs of DBKL from taking further action on the matter."

[Bahasa Malaysia Translation: "Datuk Profesor Sundra Rajoo juga telah berbuat mengikut kehendaknya sesuka hati. Di bawah arahan beliau AIAC telah mendirikan sebuah papan iklan elektronik bagi tujuan pengiklanan untuk menjana pendapat Pusat tersebut. Ini ialah suatu pelanggaran status Bangunan Sulaiman sebagai sebuah bangunan warisan. Datuk Profesor Sundra Rajoo juga telah dinasihatkan oleh En. Gan daripada Ledtronics Sdn Bhd untuk merasuah pegawai DBKL untuk mendapatkan kebenaran. Apabila kini menerima reaksi untuk pemasangan papan iklan elektronik tersebut, Datuk Profesor Sundra Rajoo cuba untuk menggunakan pengaruh Menteri Undang-Undang untuk campur tangan dalam siasatan dan menghalang keadilan serta masuk campur urusan DBKL dalam mengambil tindakan lanjutan mengenai perkara tersebut."];

(h) "In addition to the above, Datuk Professor Sundra Rajoo also abuses his position as the appointing authority under the Arbitration Act and the Construction Industry Payment and Adjudication Act. He is known to appoint only his friends and well wishers as arbitrators."

[Bahasa Malaysia Translation: "Selain daripada perkara di atas, Datuk Profesor Sundra Rajoo juga menyalahgunakan kedudukannya sebagai pihak berkuasa melantik di bawah Akta Timbang Tara dan Akta Pembayaran dan Adjudikasi Industri Pembinaan. Memang diketahui bahawa beliau hanya melantik rakan-rakannya menjadi penimbang-tara."];

(i) "While newcomers are placed in a list where they usually receive cases with dispute amounts of under RM500,000, Datin Vanitha Annamalai, his wife, is often given matters above RM2,000,000.00 as the amount is

dispute determines the amount of fees imposed by the adjudicator. He has abused his power to ensure Datin Vanitha passes the adjudication examination and rigged for her to be failed for the first time so as to appear that there was not interference from him."

[Bahasa Malaysia Translation: "Pendatang baru adalah diletakkan dalam senarai di mana mereka hanya menerima kes-kes pertikaian yang melibatkan jumlah di bawah RM 500,000.00 manakala isterinya, Datin Vanitha Annamalai sering diberikan kes-kes yang melibatkan jumlah melebihi RM2,000,000.00 kerana jumlah pertikaian akan menentukan jumlah fi yang dikenakan oleh pengadil. Beliau telah menyalahgunakan kuasanya untuk memastikan Datin Vanitha lulus peperiksaan adjudikasi dan telah menipu untuk beliau gagal dalam percubaan pertama untuk memberi gambaran bahawa tiada campur tangan daripada beliau."];

(j) "While there is a guideline that an adjudicator must have at least 7 years of experience, he has now enrolled his daughter, Nisha Kamilla Sundra Rajoo and empanelled her as an adjudicator, despite of her not having 7 years of experience in the construction industry and is only a chambering student in Raja Daryl & Loh."

[Bahasa Malaysia Translation: "Walaupun terdapat garis panduan bahawa pengadil mesti mempunyai pengalaman sekurang-kurangnya 7 tahun, namun beliau kini telah mendaftarkan anak perempuannya, Nisha Kamilla Sundra Rajoo dan menjadikannya dalam panel pengadil, walaupun beliau tiada pengalaman selama 7 tahun dalam industri pembinaan dan hanya merupakan pelatih dalam kamar di Tetuan Raja Darryl & Loh."];

(k) "While he was appointed as the President of the Chartered Institute of Arbitrators in the year 2016, Datuk Professor Sundra Rajoo also was reimbursed by the Chartered Institute of Arbitrators for all expenses, particularly travels, incurred by him in carrying out his duties as President. Datuk Professor Sundra Rajoo has also made the same claim, in duplicate, to the AIAC. While there was only one set of expenses incurred by him, he has made the claim for the same expenses to both the Chartered Institute of Arbitrators and to the Asian International Arbitration Centre. It is believed that because of these claims, throughout 2016, he has profited over RM1 million of these claims."

[Bahasa Malaysia Translation: "Semasa beliau dilantik sebagai Presiden Institut Penimbang Tara Bertauliah pada tahun 2016, Datuk Profesor Sundra Rajoo juga telah dibayar balik oleh Institut Penimbang Tara Bertauliah tersebut untuk semua perbelanjaan, khususnya perjalanan yang ditanggung olehnya dalam menjalankan tugasnya sebagai Presiden. Datuk Profesor Sundra Rajoo juga telah membuat tuntutan berulang kepada AIAC. Walaupun hanya terdapat satu set perbelanjaan yang ditanggung oleh beliau, beliau telah membuat tuntutan bagi perbelanjaan yang sama kepada Institut Penimbang Tara Bertauliah dan kepada Pusat Timbang Tara Antarabangsa Asia. Ia dipercayai bahawa atas tuntutan-tuntutan ini, sepanjang tahun 2016, beliau telah mengaut keuntungan lebih RM1 juta daripada tuntutan-tuntutan ini."];

(l) "Datuk Professor Sundra Rajoo also has used the funds of the AIAC to purchase the books written by him. These books are distributed indiscriminately and for free to almost everyone. It is given out free at conferences indoor to widen its circulation, as he in return gets the royalty for the sales of these book."

[Bahasa Malaysia Translation: "Datuk Profesor Sundra Rajoo juga telah menggunakan dana AIAC untuk membeli buku yang dikarang olehnya. Buku-buku ini diedarkan kepada sesiapa sahaja dan secara percuma kepada hampir semua orang. Ia diberikan secara percuma di persidangan tertutup untuk meluaskan pengedarannya, kerana secara balasannya, beliau mendapat royalti bagi penjualan buku-buku ini."]; and

(m) "The level of corruption runs deep in the AIAC. The following people are fully aware and had worked in close relationship with Datuk Professor Sundra Rajoo in carrying out all his instruction on the abuse of funds and authority by Datuk Professor Sundra Rajoo. These are the key people who would be able to furnish further information and uncover further scandals going on at the AIAC:

(1) Smrithi Ramesh: promoted from Counsel to Deputy director having receive five times promotion in the period of 3 years and a salary package of RM 22,000 and an annual bonus of 5 months amounting to RM 110,000. She is privy to all information pertaining to the corruption in AIAC by Datuk Professor Sundra Rajoo. She is an accomplice to all Sundra Rajoo corruption and abuse of power.

(2) Carol Yee: The Personal Assistant who had carried out many transactions for Datuk Professor Sundra Rajoo. Paid a salary of RM9,000 and handsome annual bonuses to keep all of his activities quiet.

(3) Jun Yong: Former Head of Finance who carried out many of Datuk Sundra's Rajoo's illegal activity and helped him dispose many evidence of such conduct particularly of the double claims as the President of Chartered Institute of Arbitrators. He has since resigned from the AIAC.

(4) Huganeswaran Veerasagram : Privy to many information of all illegal activities between Datuk Professor Sundra Rajoo and the former law minister, Dato Sri Azlina binti Othman Said. Has since left the AIAC but was paid a handsome annual bonus to keep his mouth shut.

(5) Dinsh Kummar: current Head of Finance, privy to all illegal transaction carried out by Datuk Professor Sundra Rajoo.

(6) Danaindran Rajendran who assisted in leasing a car and hiring a driver using the AIAC funds for the personal use of the minister's son.

[Bahasa Malaysia Translation: "Amalan rasuah berada di tahap yang mendalam di AIAC. Penama-penama berikut mengetahui secara sepenuhnya dan telah bekerja rapat dengan Datuk Profesor Sundra Rajoo

dalam menjalankan semua arahannya dalam penyalahgunaan dana dan kuasa oleh Datuk Profesor Sundra Rajoo. Mereka ini orang penting yang mampu memberikan maklumat lanjut dan mendedahkan skandal yang sedang berlaku dalam AIAC:

(1) Smrithi Ramesh: Dinaikkan pangkat daripada Peguam kepada Timbalan Pengarah setelah menerima kenaikan pangkat sebanyak 5 kali dalam tempoh 3 tahun dan pakej gaji sebanyak RM22,000.00 dan bonus tahunan 5 bulan gaji berjumlah sebanyak RM110,000.00. Beliau mengetahui semua maklumat berkaitan rasuah dalam AIAC oleh Datuk Profesor Sundra Rajoo. Beliau ialah rakan sejenayah kepada semua amalan rasuah dan penyalahgunaan kuasa Datuk Profesor Sundra Rajoo.

(2) Carol Yee: Pembantu Peribadi yang telah menjalankan banyak transaksi untuk Datuk Profesor Sundra Rajoo. Dibayar gaji sebanyak RM9,000.00 dan bonus tahunan yang lumayan untuk menyembunyikan aktiviti-aktivitinya.

(3) Jun Yong: Bekas Ketua Kewangan yang telah menjalankan banyak aktiviti salah Datuk Profesor Sundra Rajoo dan telah membantu beliau untuk melupuskan banyak bukti kelakuan sedemikian terutamanya berkenaan tuntutan berulang sebagai Presiden Institut Penimbang Tara Bertauliah. Beliau kini telah meletakkan jawatan daripada AIAC.

(4) Huganeswaran Veerasagram: Mengetahui banyak makluman berkenaan aktiviti-aktiviti salah di antara Datuk Profesor Sundra Rajoo dan bekas Menteri Undang-Undang, Dato' Sri Azalina Binti Othman Said. Beliau kini telah meninggalkan AIAC tetapi telah dibayar dengan bonus tahunan yang lumayan untuk menutup mulutnya.

(5) Dinsh Kummar: Ketua Kewangan semasa, mengetahui semua transaksi salah yang dilakukan oleh Datuk Profesor Sundra Rajoo. 6) Danaindran Rajendran yang membantu dalam penyewaan kereta dan mengupah pemandu menggunakan dana AIAC untuk kegunaan peribadi anak Menteri."].

(Hereafter collectively "the Impugned Statements")

Particulars Of Defamatory Meaning Of Impugned Statements

[26] The plaintiff contends and shall contend that the impugned statements in the poison pen letter are completely untrue, malicious, false, inaccurate, misleading, baseless and constitute very serious libels against the plaintiff (who was referred to by his name). The plaintiff also contends and shall contend that the impugned statements in the poison pen letter were calculated to disparage the plaintiff and tarnish the plaintiff's reputation.

[27] In the above regard, the impugned statements in the poison pen letter, mean and would have been understood to mean, in their plain, natural and ordinary meaning and/or alternatively, by way of insinuation, inference and/or innuendo, the following defamatory meanings against the plaintiff:

(i) the plaintiff had, during the plaintiff's tenure as director of the AIAC, engaged in corrupt practices to enrich himself, the plaintiff's family and the plaintiff's close friends;

(ii) the plaintiff had, between the period February 2016 to sometime in 2017, continued to occupy the office of director of the AIAC unlawfully and without the authorisation of AALCO and/or the Government of Malaysia;

(iii) the plaintiff had, during the plaintiff's tenure as director of the AIAC, abused and/or misappropriated monies belonging to the AIAC;

(iv) the plaintiff had, during the plaintiff's tenure as director of the AIAC, engaged in the bribery of officers of the Government of Malaysia and/or civil servants, including but not limited to two former Ministers of Law;

(v) the plaintiff had, during the plaintiff's tenure as director of the AIAC, unlawfully induced officers of the Government of Malaysia with bribes to procure an extension of the plaintiff's contract as director of the AIAC;

(vi) the plaintiff had, during the plaintiff's tenure as director of the AIAC, abused the monies and facilities of the AIAC to enrich two former Ministers of Law and their respective staff;

(vii) the plaintiff had actively sought to unlawfully impede, frustrate and/or obstruct investigations against the plaintiff by relevant authorities;

(viii) the plaintiff had, during the plaintiff's tenure as director of the AIAC, undertaken unlawful acts to generate income for the AIAC, including but not limited to unlawfully erecting an electronic billboard and thereafter bribing officers of Dewan Bandaraya Kuala Lumpur (DBKL) to obtain relevant approvals;

(ix) the plaintiff had, during the plaintiff's tenure as director of the AIAC, abused the plaintiff's position to influence officers of the Government of Malaysia and/or civil servants;

(x) the plaintiff had, during the plaintiff's tenure as director of the AIAC, abused the plaintiff's position of power and was derelict in the plaintiff's duties in respect of the appointment of arbitrators and adjudicators by appointing only the plaintiff's friends and family members;

(xi) the plaintiff had, during the plaintiff's tenure as director of the AIAC, unlawfully utilised the AIAC's funds to purchase large volumes of books authored by the plaintiff;

(xii) the plaintiff had, during the plaintiff's tenure as director of the AIAC, unlawfully and/or illegally enriched several officers and/or employees of the AIAC;

(xiii) the plaintiff had, during the plaintiff's tenure as director of the AIAC, engaged in false-reporting and/or under-reporting in accounting and finance matters;

(xiv) the plaintiff is unprincipled, corrupt, unethical and immoral;

(xv) the plaintiff lacks integrity, is dishonest and is unfit to be director of the AIAC;

(xvi) the plaintiff ought to be investigated, charged and convicted of criminal offences;

(xvii) by reasons aforesaid, the plaintiff had, during the plaintiff's tenure as director of the AIAC, acted in contravention of the law;

(xviii) by reasons aforesaid, the plaintiff had, during the plaintiff's tenure as director of the AIAC, committed criminal offences including but not limited to fraud, forgery, criminal conspiracy, furnishing false information, dishonest misappropriation of property, criminal breach of trust, bribery of civil servants and/or cheating; and

(xix) by reasons aforesaid, the plaintiff was/is guilty of criminal offences committed, including but not limited to fraud, forgery, criminal conspiracy, furnishing false information, dishonest misappropriation of property, criminal breach of trust, bribery of civil servants and/or cheating.

Facts Relied Upon By Plaintiff To Prove Authorship And Publication By Defendants

[28] Although the poison pen letter was unsigned, the plaintiff contends and shall contend that the following facts will point to the irresistible conclusion and/or irresistible inference that the poison pen letter, and thereby the impugned statements, were jointly and/or severally written and/or published and/or caused to be written and/or caused to be published by the defendants, namely:

(i) forensic examinations and/or analyses of soft copies of the poison pen letter confirm that the author of the poison pen letter was "Leaderonomics" (*ie*, the first defendant). In support of this, the plaintiff shall be tendering export reports at the trial of this claim;

(ii) at the material time of the publication and circulation of the poison pen letter (*ie*, on or about 28 September 2018), the second defendant was in the employ of the first defendant where the second defendant had access to the first defendant's facilities including the first defendant's computers and was also provided with a company computer by the first defendant;

(iii) during the time of the second defendant's employ with the AIAC, the second defendant reported directly to the plaintiff and had wide access to and was privy to information and documents relating to the AIAC

and the plaintiff, confidential and otherwise – matters of which include those outlined in the poison pen letter, *albeit* presented therein in a manner which is completely untrue, malicious, false, inaccurate, misleading, baseless and calculated to disparage the plaintiff;

(iv) in or about February 2018, the second defendant tendered his notice of resignation from the AIAC. In this respect, the second defendant left the AIAC and the plaintiff on bad terms, due to the following:

(i) when the second defendant was not given a promotion and/or a raise in mid-2017 by the AIAC, the second defendant became disinterested in his work and underperformed in his day-to-day tasks;

(ii) the second defendant also took objection to the appointments of Illia Putin as Deputy Head of Legal of the AIAC and Harald Sippel as the Head of Legal of the AIAC in late 2017, both of whom the second defendant now had to report to. The plaintiff contends and shall contend that the second defendant's unhappiness and/or dissatisfaction stemmed from the second defendant's belief that he would be appointed to either one of the two roles;

(iii) for the above reasons, the second defendant was unhappy, dissatisfied and/or angry with the plaintiff and the then Deputy director of the AIAC, Smrithi Ramesh.

(v) on 14 April 2021, the plaintiff's solicitors issued a letter to the directors of the first defendant, expressing their intention to pursue the second defendant for defamation and requesting – *inter alia* – confirmation of particulars relating to the second defendant's employment with the first defendant and access to the second defendant's computer(s) during the second defendant's employ with the first defendant (hereafter "the plaintiff's request for particulars & access");

(vi) despite the plaintiff's request for particulars & access, the first defendant, to date, failed, refused and/or neglected to comply with the same;

(vii) by all reasons aforesaid, the irresistible conclusion and/or irresistible inference is that the first defendant and the second defendant are jointly and/or severally responsible and liable for the authorship and publication of the poison pen letter; and

(viii) further and/or in the alternative, the plaintiff shall rely on s. 114A of the Evidence Act 1950.

[29] The plaintiff prays for general damages, aggravated damages and/or exemplary damages for libel, interest and costs.

A **The Pleaded Defence Of The First Defendant**

[30] The first defendant contends in its amended defence dated 8 March 2022 (encl. 40) that they did not author, publish, circulate or disseminate the poison pen letter.

B **[31]** The first defendant also contends that the reference to "Leaderonomics" in the forensics examination could be a default setting or default reference, editable, and does not by any stretch of the imagination support a conclusion that the first defendant was the author of the poison pen letter.

C **[32]** The poison pen letter contains information that the first defendant could not have possibly or reasonably have knowledge of, or known. The first defendant also does not have the means and resources of obtaining the nature and particulars of information contained in the poison pen letter. The first defendant has nothing to gain whatsoever by publishing, circulating or D disseminating the poison pen letter. (Paragraph 42 of amended defence).

[33] The first defendant has no basis or motive to be involved whether jointly or severally in the authoring, publishing and/or disseminating the poison pen letter. (Paragraph 43 of amended defence).

E **[34]** The first defendant further contends that from 2 July 2018 to 30 September 2018, the second defendant was engaged as an independent contractor with the first defendant with a job description of "beyond expectations partner". (Paragraph 37 of amended defence).

[35] From 1 October 2018 to 31 December 2018, the second defendant's F engagement was converted into a full-time employment as "beyond expectations partner". From 1 January 2019 to 16 March 2019, the second defendant was promoted as the first defendant's "head of legal". (Paragraph 37 of amended defence).

[36] The first defendant also contends that the second defendant was given G a work laptop by first defendant. Nevertheless, the first defendant asserts that it did not have control or exercised any control of the work laptop issued to the second defendant at all material times. (Paragraph 38 of amended defence).

[37] In addition, the first defendant contends that the plaintiff is not entitled H to invoke s. 114A of the Evidence Act 1950.

The Trial Process

[38] The trial took four days from 10 April 2023 to 13 April 2023.

[39] The plaintiff called six witnesses. They are: I

(i) the plaintiff himself [PW1]. His witness statement is marked as WSPW1;

(ii) Datin Vanitha Annamalai [PW2] who is the spouse of the plaintiff. Her witness statement is marked as WSPW2;

(iii) Akash Rosen a/l Ramkalaish [PW3] who is the first IT forensic expert called by the plaintiff;

(iv) Steven Wilkinson [PW4] who is the second IT forensic expert called by the plaintiff;

(v) Dr David Fong Shiu Man [PW5] who is a barrister from Hong Kong. His witness statement is marked as WSPW5; and

(vi) HE Professor Kennedy Gastorn [PW6] who was the former Secretary-General of The Asian-African Legal Consultative Organization. ["AALCO"]. His witness statement is marked as WSPW6.

[40] The first defendant called three witnesses. They are:

(i) Ang Hui Ming [DW1] a director of the first defendant. Her witness statement is marked as WSDW1;

(ii) Roshan Thiran a/l Nyanen Thiran [DW2] a director of the first defendant. His witness statement is marked as WSDW2; and

(iii) Tan Keh Win [DW3] who is the IT forensic expert called by the first defendant.

[41] Parties concurrently filed their written closing submissions and written submissions in reply.

[42] Oral submissions by counsel were held before me on 23 June 2023. The decision was reserved. I delivered the decision on 30 June 2023.

The Issues To Be Tried Agreed By The Parties

[43] The issues to be tried agreed by the parties dated 23 February 2023 (encl. 81/marked E) to be determined by this court are:

(i) whether the first defendant, either jointly and/or severally wrote and/or published the poison pen letter (as defined in encl. 2) about the plaintiff on or about 28 September 2018?

(ii) whether the plaintiff is entitled to the relief sought against the first defendant in the amended writ of summons dated 28 December 2021 [encl. 1] and the statement of claim dated 30 December 2021 [encl. 2].

The Two Agreed Issues To Be Tried

[44] I will now proceed to consider the two agreed issues to be tried.

Agreed Issue [i]

Whether The First Defendant, Either Jointly And/Or Severally Wrote And/Or Published The Poison Pen Letter (As Defined In Enclosure 2) About The Plaintiff On Or About 28 September 2018?

Analysis Of The Court

Plaintiff Has Dropped Its Claim That The First Defendant, Either Jointly And/Or Severally Wrote The Poison Pen Letter [First Limb Of Agreed Issue 1] And Am Proceeding Only On The Second Limb Of Publishing The Poison Pen Letter

[45] Agreed issue [i] has two limbs. They are:

(i) whether the first defendant, either jointly and/or severally **wrote** the poison pen letter (as defined in encl. 2) about the plaintiff on or about 28 September 2018?

(ii) whether the first defendant, either jointly and/or severally **published** the poison pen letter (as defined in encl. 2) about the plaintiff on or about 28 September 2018? (emphasis added)

[46] The plaintiff in its post-trial written submissions [encl. 112] has now dropped the first limb and am proceeding only on the second limb.

[47] This is clear from the concession made in the plaintiff's written submissions at paras. 32 and 33, in particular 33, which read, quote:

> 32. Guidance may be drawn from the most recent decision of the Federal Court which restated the law on this issue, *Raub Australian Gold Mining Sdn. Bhd. v. Hue Shieh Lee* [2019] 3 CLJ 729 (Federal Court) where paras [29]-[31] are reproduced below for ease of reference:
>
> The Law on Defamation
>
> > [29] Defamation is committed when the defendant publishes to a third person words or matters containing untrue imputation against the reputation of the plaintiff …
> >
> > [31] In other words, the plaintiff must prove three elements of the tort of defamation, which are: (i) the plaintiff must show that the statement bears defamatory imputations; (ii) the statement must refer to or reflect upon the plaintiff's reputation; and (iii) the statement must have been published to a third person by the defendant." (emphasis added)
>
> 33. Of the three (3) elements above, **the plaintiff and the first defendant in the Issues to be Tried (Bundle E) have narrowed down the dispute to only the 3rd element** (*ie*, whether the first defendant, joint and/or severally, published the poison pen letter to third parties).
>
> - unquote. (emphasis added)

[48] I would, firstly, observe that it is inaccurate of counsel for the plaintiff to say, quote "the plaintiff and the first defendant in the issues to be tried (bundle E) have narrowed down the dispute to only the third element (*ie*, whether the first defendant, joint and/or severally, published the poison pen letter to third parties). unquote".

[49] There was no narrowing down of the dispute for the simple reason that agreed issue [i] as agreed by parties has two limbs, as I have set out above, and not as stated in the plaintiff's written submissions at para. 33.

[50] This is also clear from the response of the first defendant in its reply written submissions [encl. 116] paras. 2 to 7 which read:

> B. Analysis Of The Plaintiff's Written Submissions
>
> 2. By his written submissions, *the plaintiff's case against D1 continues to shift from his previous positions and now appears to be confined to D1 having*:
>
> *(a) Jointly and/or severally published the PPL; and/or*
>
> *(b) Caused to publish the PPL.*
>
> 3. The plaintiff in his written submissions has not dealt with nor established in any manner whatsoever that D1 authored or was involved in the authorship of the PPL, either by *directly writing* the PPL *or indirectly causing* the PPL to be written. *The plaintiff has effectively abandoned proving that D1 wrote the PPL and with that we say, the identity of the person(s) behind the actual authorship of the PPL remains at large, unproven and not established*.
>
> 4. The plaintiff has also confirmed that his pleaded case against D1 is not premised on vicarious liability. This, in essence, reduces the plaintiff's claim against D1 to the issue of publication where the plaintiff says that D1 was involved, directly or indirectly, in the "publication" of the PPL.
>
> 5. *For D1, the abandonment of issues and narrowing of the plaintiff's case against D1 is significant because it finally enables D1 an opportunity to properly address the plaintiff's true complaint and not be forced to react to the plaintiff's scatter-gun pleadings*.
>
> 6. This distinction, we say, will also be tremendously helpful to this Honourable Court because it accords the court an opportunity to judicially appreciate the true value and weight of the body of evidence let in throughout the Trial.
>
> 7. *As the focus of the plaintiff's submissions is that D1 was responsible for the publication of the PPL*, we now turn to firstly, setting out the circumstantial evidence that the plaintiff says proves or allows for a presumption of publication against D1, before we demonstrate that the plaintiff's case is extremely fanciful, imaginative and ultimately wrong at every conceivable level … (emphasis added)

Whether The First Defendant, Joint And/Or Severally, Published The Poison Pen Letter To Third Parties

[51] As a result of the concession of the plaintiff's counsel, *albeit* made late in the day as I have already earlier at the commencement of trial expressed my reservation on the stand of the plaintiff that the first defendant which is an inanimate object can write the poison pen letter, the issue now is "Whether the first defendant, jointly and/or severally, published the poison pen letter to third parties".

[52] I will now deal with the issue "Whether the first defendant, jointly and/or severally, published the poison pen letter to third parties".

The Plaintiff's Contentions

[53] Firstly, the plaintiff contends that the general principle of law is that "all persons who are directly or indirectly involved in the commission of the tort are jointly and severally liable for all damages caused by it." Nine cases are cited in support of this proposition. (See encl. 112 plaintiff's written submissions paras. 15 to 22).

[54] On the specific issue of whether the first defendant, published the poison pen letter to third parties, the plaintiff says that this is, quote, "satisfied as against the first defendant in one of two ways:

(a) that, based on the facts and law, the irresistible conclusion and/or irresistible inference is that the first defendant jointly and/or severally published the poison pen letter to third parties; and/or

(b) by invoking the presumption under Section 114A of the Evidence Act 1950 against the first defendant." Unquote.

(See encl. 112 plaintiff's written submissions para. 53).

The First Defendant's Contentions

[55] The first defendant says the nine cases cited by the plaintiff are not applicable to the facts of our case.

[56] On the specific issue of whether the first defendant, published the poison pen letter to third parties, the first defendant says that:

(i) the irresistible conclusion is that the first defendant did not publish or cause to publish the poison pen letter;

(ii) presumption of fact under s. 114A(3) of the Evidence Act 1950 cannot be invoked against the first defendant;

(iii) providing a work laptop to the second defendant does not make the first defendant a publisher.

Analysis of the Court

Meaning Of 'Publication' In Defamation Law

[57] "Publication" means making the defamatory statement known to some other person other than of whom it is written or spoken. The statement must be published to a third party. (*Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee* [2019] 3 CLJ 729 (Federal Court)).

When Is There Publication By A Company Resulting In Liability For Defamation?

[58] In *Lysko v. Braley* [2006] CanLII 17253 (Court of Appeal for Ontario), the Ontario Court of Appeal held:

> The claim of defamation was also made against "the CFL, as employer". *Pleading that the CFL, as employer, was liable for the defamation was not sufficient*. A principal can be liable for defamatory comments by its agent if the agent was acting within the scope of the agency at the time of the publication. Similarly, *an employer can be vicariously liable for the defamatory expression of an employee acting within the scope of his employment. Alternatively, a corporation may be liable for publication by its operating mind.* In this case, *there was no allegation that the words complained of were published or authorized to be published by the corporate defendants. Any liability attaching to them had to arise vicariously in connection with the actions of the individual defendants. The plaintiff failed to set out facts which would serve as a sufficient foundation upon which liability could attach to the corporate defendants for the acts of the individual defendants. The defamation claims against the corporate defendants were properly struck out*.
>
> (emphasis added)

[59] The Ontario Court of Appeal further held, 'absent proof of vicarious liability or actions in concert, we do not make individuals liable for the anonymous acts of others.':

> [94] In this case, if the appellant proves the facts pleaded, he will not have made out a *prima facie* case. Proving that one or more of a group of four people, not alleged to be acting in concert and not alleged to otherwise to be responsible for each other's actions, defamed the plaintiff, does not make out a case against any of them. **Absent proof of vicarious liability or actions in concert, we do not make individuals liable for the anonymous acts of others**. (emphasis added)

[60] From *Lysko v. Braley* [2006] CanLII 17253 cited above and other decided cases the following principles can be distilled. For there to be publication by a company resulting in liability for defamation:

(i) The defamatory statement must be officially issued by the company to a third party. Instances would be when the defamatory statement is issued to a third party by the company on the company's letterhead. (*Mrs Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors* [1978] 1 LNS 125; [1979] 1 MLJ 71; *Big Man Management Sdn Bhd v. Tenaga Nasional Bhd* [2020] 8 CLJ 27 at para. 115; *Saharudin Abd Jabar v. Bank Islam Malaysia Bhd* [2015] 1 LNS 1059; [2016] 7 MLJ 293, Mohamed Zaini Mazlan JC; *Financial Information Services Sdn Bhd*

v. Hj Salleh Hj Janan [2012] 8 CLJ 885 and *WLP Industrial Solutions (M) Sdn Bhd v. KL-Kepong Rubber Products Sdn Bhd* [2011] 1 LNS 818; [2011] 6 MLJ 623 HC); or when the defamatory statement is put on the company's database which can be accessed by third parties. (*Tan Ah Hong v. CTOS Data System Sdn Bhd* [2016] 1 LNS 90; [2016] 3 MLRA 690 CA). Other instances would be when the company is a publisher of a newspaper and the defamatory statement appears on its newspaper (*Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393); or when the company is a tv station and the defamatory statement appears on its news channel. (*Raja Syahrir Abu Bakar & Anor v. Manjeet Singh Dhillon & Other Appeals* [2019] 4 CLJ 301; [2020] 3 MLJ 482 CA); or

(ii) When the defamatory statement was spoken to a third party by the company's employee and or agent for and on behalf of the company. (*Triplex Safety Glass Co Ltd v. Lancegaye Safety Glass (1934) Ltd* [1939] 2 All ER 613 at 620 CA and *Big Man Management Sdn Bhd v. Tenaga Nasional Bhd* [2020] 8 CLJ 27 at (paras. 114 and 122) HC).

Application To The Facts Of Our Case

[61] The above cases include the nine cases cited by the plaintiff. It is clear that the facts in those cases are different from our case.

[62] In our case, the poison pen letter was not issued by the first defendant. The poison pen letter is not on the first defendant's website or issued on the first defendant's letterhead. See the testimonies of Ang Hui Ming [DW1] and Roshan Thiran a/l Nyanen Thiran [DW2].

[63] During oral submissions before me, in response to my posed question "What are the instances a company can be said to publish a defamatory statement?" counsel for the plaintiff submitted that the first defendant had published the poison pen letter through its employee and or agent.

[64] I have scrutinised the evidence carefully. No evidence was led by the plaintiff during the trial in support of this submission.

[65] There is really no evidence that the poison pen letter was issued by any of the first defendant's employees for and on behalf of the first defendant.

[66] Neither is it proven that it was the late second defendant who issued the poison pen letter.

[67] Even if it was the late second defendant who issued the poison pen letter (which is not proven), it was not issued for and on behalf of the first defendant.

[68] Under s. 103 of the Evidence Act, "The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

[69] It is obvious after trial, in view of the testimonies of the three forensic experts, that the plaintiff cannot prove the poison pen letter was issued by any of the first defendant's employees for and on behalf of the company.

Plaintiff's Two Grounds To Prove Publication By First Defendant

[70] To circumvent s. 103 of the Evidence Act, the plaintiff in its written submissions (encl. 112) at para. 53 submits that the element of publishing "may be satisfied as against the first defendant in one of two ways:

> (a) that, based on the facts and law, the irresistible conclusion and/or irresistible inference is that the first defendant jointly and/or severally published the poison pen letter to third parties; and/or
>
> (b) by invoking the presumption under Section 114A of the Evidence Act 1950 against the first defendant."

[71] In my view, the two grounds relied on by the plaintiff failed to prove publication by the first defendant. My reasons are as follows.

Plaintiff's First Ground – "That Based On The Facts And Law, The Irresistible Conclusion And/Or Irresistible Inference Is That The First Defendant Jointly And/Or Severally Published The Poison Pen Letter To Third Parties."

[72] The plaintiff has cited numerous cases where the courts had considered whether the human defendants in those cases had published anonymous letters which were defamatory of the plaintiffs in those cases.

[73] Looking at the totality of the facts and evidence presented in those cases, the courts there had made inferences and concluded that the human defendants there had indeed published the anonymous letters which were defamatory of the plaintiffs in those cases. The cases cited by the plaintiff are *Pan v. Cheng; Zhou v. Cheng* [2021] NSWSC 30 (Supreme Court, New South Wales), *Amanatidis & Anor v. Darmos* [2011] VSC 163 (Supreme Court, Victoria), *Richard Alan Parsons v. Elizabeth Garnett & Ors* [2022] EWHC 3017 (KB) High Court of England & Wales, *Maui Ashley Solomon v. David James Prater* [2021] NZHC 481 (High Court, New Zealand), and *Stanislaus J Vincent Cross v. Ganesan Vyramutoo & Anor* [2020] 10 CLJ 263 (High Court).

[74] These cases cited by the counsel for the plaintiff sets out the law on how a court can determine that a particular human defendant is responsible for an anonymous defamatory letter. But it is a far cry from the facts of our case here.

[75] In our case, those cases cited by the plaintiff would be relevant and indeed pertinent if it is against the late second defendant, who has since died and the suit abated.

[76] But these cases are not applicable to the claim against the first defendant as the plaintiff had not identified and pleaded the name(s) of the employee(s) of the first defendant who had supposedly published the poison pen letter for and on behalf of the first defendant. Neither has the plaintiff

led any evidence to prove an employee(s) of the first defendant was authorised to publish the poison pen letter for and on behalf of the first defendant.

Is Metadata Analysis Reliable?

[77] I will now examine the plaintiff's claim that the metadata properties of the Microsoft Word copy of the poison pen letter dated 28 September 2018, which was titled MACC.docx prove that the first defendant published the poison pen letter.

[78] On 30 October 2018, a Microsoft Word copy of the poison pen letter dated 28 September 2018 was sent *via* email from one dk@mustapharaj.com to one michelle_sunita@hotmail.com. This Microsoft Word copy of the poison pen letter dated 28 September 2018 was titled MACC.docx.

[79] The plaintiff's defamation suit against the first defendant is premised solely on the fact that the "author" and "last modified by" metadata properties of the MACC.docx refer to a username "Leaderonomics", which is the company name of the first defendant.

[80] Thus, the plaintiff alleges that the "metadata shows poison pen letter originated from the first defendant ('Leaderonomics')." (See encl. 112 plaintiff's written submissions para. 75).

[81] There are two flaws in the plaintiff's submissions.

[82] Firstly, the first defendant is a corporate entity and not a human. A company, not being a natural person, cannot act on its own. It can act only through the agency of natural persons.

[83] The Federal Court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641; [2018] 2 MLJ 177, held:

> [103] A company is an artificial person and has no physical existence. Its legal existence is recognised only by reason of the Act. **A company, not being a natural person, cannot act on its own; it can act only through the agency of natural persons**. As stated by Cairns LJ in *Ferguson v. Wilson* (1866) LR 2 Ch App 77 at p 89 'the company itself cannot act in its own person, for it has no person'. (emphasis added)

[84] In *Christopher Grant v. Teh Beng Leong & Anor* [2019] 1 LNS 1922; [2019] MLJU 1574 (High Court) the court said:

> [10] *The plaintiffs claim against the first defendant for negligence is clearly misconceived. The first defendant is a body corporate or an artificial legal person created by written law. As such it can only act through living persons and liability visited upon it vicariously for the acts of those persons such as its employees or agents. The first defendant is therefore incapable of committing the tort of negligence*. On the other hand, any person who commits the tort of negligence is personally liable to the person he causes injury or damage to. (emphasis added)

[85] Thus, the first defendant can only publish the MACC.docx through an authorised employee. (See *Lysko v. Braley* [2006] CanLII 17253 (Court of Appeal for Ontario)). But this is not the plaintiff's pleaded case. The plaintiff's pleaded case is not that an authorised employee of the first defendant published the Microsoft Word copy of the poison pen letter dated 28 September 2018 titled MACC.docx.

[86] The plaintiff's pleaded case is that the first defendant itself published the Microsoft Word copy of the poison pen letter dated 28 September 2018 titled MACC.docx. There is no such evidence adduced at trial in support of this pleaded case.

Metadata Properties Analysis Is Unreliable

[87] Secondly, the plaintiff's claim that the metadata properties of the Microsoft Word copy of the poison pen letter dated 28 September 2018 which was titled MACC.docx prove that the first defendant published the poison pen letter is contradicted by the plaintiff's own two forensic experts.

[88] Under cross-examination, PW3 Akash Rosen admitted candidly that the MACC.docx itself cannot establish or prove which computer, server, account or IP address that the MACC.docx originated from:

> Cross-Examination of PW3, Akash Rosen (Notes of Proceedings page 148-150)
>
> DHR: And in all the copies that you analysed, Mr. Akash, does the first defendant appear in any of those documents that you analyse?
>
> PW3: Yes. As the "author" and the "last saved".
>
> DHR: Only that right?
>
> PW3: Yes.
>
> DHR: Nothing more? *There is no link to show that it originated from a server or from a website*?
>
> PW3: *No.*
>
> DHR: *Or some other IP address that can be traced to the first defendant*?
>
> PW3: *No.* There is no way you can get those IP addresses. …
>
> DHR: So in your report, Mr. Akash. H1 and H2. *I'm putting it to you that there is no evidence that the MACC.docx originated from a device owned by the first defendant. You agree with me*?
>
> PW3: *Yes.*
>
> DHR: *There is also no evidence that it originated from an email address or an Internet account owned by the first defendant. Correct?*
>
> PW3: *Yes.*
>
> DHR: *There is also no evidence that the MACC.docx originated from an IP address which you can connect to the first defendant*.
>
> PW3: *From the document, no.* (emphasis added)

[89] Under cross-examination, the plaintiff's second expert witness PW4 Steven Wilkinson admitted the metadata properties should only be taken at face value, namely what is the username at the time the MACC.docx was created and last modified. These metadata properties do not prove the identity of the actual user behind the username "Leaderonomics":

Cross-Examination of PW4, Steven Wilkinson (Notes of Proceedings page 184-185, 194-195)

DHR: So, when you say you understand "author" to be writer, it's basically a system feature that tells you to form that conclusion, correct?

PW4: It's a feature of the Microsoft application, yes.

DHR: *It doesn't necessarily mean that the name that appears is the actual writer?*

PW4: *I couldn't put a writer's fingers on the keys, no.*

DHR: Taking your statement at its highest, would you say that an organization wrote the document that you were forensically analyzing?

PW4: *I would say that that user name would indicate an organization.*

DHR: That is the highest it goes right? That is the highest possible inference that you can draw from your statement?

PW4: *I can infer that, that Leaderonomics is, would indicate to me as an organizational name …*

…

DHR: *So, the First defendant's expert is saying that the "author" and "last modified" metadata contained in the Word document has no value when identifying or verifying authorship or publication.* And looking at your response, basically you agree that there is no, there's little value in identifying or verifying authorship, or in this case writership, and publication?

PW4: No, they actually commented the "author" and "last modified" metadata is, has no value. *All metadata can be altered or changed in some way. And it is a generally held opinion within the forensic circles that metadata should not be relied on, on its own to prove any particular point,* it merely gives an indication. (emphasis added)

[90] I find PW4 Steven Wilkinson's testimony honest, candid and useful.

[91] The first defendant's expert DW3 has also shown that the "author" and "last modified by" metadata properties can be specified, edited, and substituted by any Microsoft Word user on any electronic device using the Microsoft Word application:

Cross-Examination of DW-3, Tan Keh Win [Notes of Proceedings page 328-337]

EK: Okay, so how are they specific seeing as you have not studied that document?

DW3: Because I saw the initial report by Mr. Akash. I have no reason to doubt his report and when I went through it, his methodology was sound. It produced the expected results. *The only thing I disagree about his report is the conclusion that he drew, which is that, the moment you see the word Leaderonomics there, then you must have mean that Leaderonomics do it. That is the part that I disagree*.

…

DW3: Okay, so, No. 1, I've looked at his report. I studied his methodology, looks fine, no problem. I agree with how he went about coming to his, I mean getting the answers that he saw. *I just don't agree with the conclusion*. And why I say that is because No. 1, when he mentioned he detected no traces of tampering upon receipt by the person who received it. So, that means from the time they received it until the time when he took a look at it, no one touched it.

DW3: *He doesn't talk about what happens before it was sent out, and before it was sent out you won't even, you may not even need to use the word tampering, it's just a case of modification of metadata in a very legitimate manner through modifying settings within Microsoft Word*. You can do that. And in some cases, *you can also do a right click of the file itself before you send it out, and change the author properties from there*. There is actually a few ways to go about doing it. You don't even have to introduce the word tampering at all. It's not malicious. It just right there.

Re-Examination of DW3, Tan Keh Win [Notes of Proceedings page 343]

DHR: Just a few questions only My Lord, only to clarify. Mr. Tan you were asked a series of questions about a forensic software being used to analyse the late D2's laptop. Should you recall that and you were asked whether traces of the poison pen letter of MACC.docx can be found, you said yes. For record you wanted to explain. Do you stand by your answer or do you wish to add on to it?

DW3: No, it's just the case of, if we were to look at the laptop that we think contains this file, *you may or may not find the file because we are not sure if it even came from that particular laptop. In fact, if we had a, if it is eventually entirely possible that the laptop used to create this file may not have even come from Leaderonomics at all*.

Because all you have going on based on the MACC.docx file, is that the "author" property, and the "last modified by", is by the screen value of Leaderonomics. *But you can easily replicate that on any other laptop with any other Microsoft Word application*.

In fact, if I wanted to and I had access to the MACC.docx file, ok, I opened that file up, I do a select all copy based on the entire text, and then keeping that information in memory, I create a brand-new Microsoft Word file, brand new Microsoft Word file, I change the options within Microsoft Word to show that "author" is now a new name, could be Tan Keh Win, no problem. I then set my system time to reflect the same time that the MACC.docx file was created, I then paste it in, I save, I'll get the exact the same result.

(emphasis added)

[92] In particular, DW3 conducted a demonstration to show that a work laptop owned by the first defendant could create multiple Microsoft Word documents with different metadata properties, one that carry the value of "John Doe" in the "author" and "last modified by" metadata properties and another one where the name "John Doe" was changed to "Leaderonomics" and the name "Leaderonomics" was reflected in the metadata properties of a new created Microsoft Word document. (See forensic report of DW3).

[93] I find Tan Keh Win/DW3's testimony confident and his testimony was never seriously challenged by counsel for the plaintiff. In fact, his testimony was shared by PW4 Steven Wilkinson's as was candidly admitted by the plaintiff in his reply submissions at para. 46:

> … the plaintiff respectfully submits that DW3's evidence on the metadata and properties of the poison pen letter, at best, only goes towards the possibility that **in principle the metadata of a Microsoft Word document may be altered (view of which Expert Steven also shared with DW3** – page 194 of NOE). (emphasis added)

[94] After hearing the three experts, I am of the view that metadata analysis can be manipulated and cannot properly be regarded as reliable evidence supportive of either side's case in a court dispute.

[95] Decisions of courts from various jurisdictions have come to similar conclusion. (*Maui Ashley Solomon v. David James Prater* [2021] NZHC 481 (High Court, New Zealand, *Commonwealth v. Davis Samuel Pty Ltd And Others (No 7)* [2013] ACTSC 146 (Supreme Court of the Australian, *Boyapati and Others v. Rockefeller Management Corporation And Others* [2008] FCA 995 (Federal Court of Australia), *Croftcall Ltd v. Morgan And Another* [2008] All ER (D) 152 (Jul) (Chancery Division), *Yitai (Shanghai) Plastic Co, Ltd v. Charlotte Pipe And Foundry Co* [2021] SGHC 198 (Singapore High Court) and *A Labour Inspector of The Ministry of Business, Innovation And Employment v. Basra & Khella Ltd* (New Zealand – BC202064023).

[96] In *Maui Ashley Solomon v. David James Prater* [2021] NZHC 481 (High Court, New Zealand), the court said of metadata from the Microsoft Word documents:

> Metadata evidence
>
> [57] Cameron Hansen, a computer forensic analyst and managing director of Datalab has sworn an affidavit. Mr Hansen was asked to assess whether the anonymous letter emanated from the defendant's computer system.
>
> [58] Mr Hansen's evidence is detailed and technical. In short, Mr Hansen extracted and reviewed the anonymous letter attached to the email "FW Letter to All Moriori from concerned Moriori.eml". The anonymous letter was a Microsoft document in relation to which Mr Hansen reported on available metadata. ..

[59] *Mr Hansen explained how a system applies a "Creator" or "Last Modified By" username to a document. Such details are drawn from the operating system itself. Specifically, the system applies the name attached to the user of the operating system nominated when the system is installed …*

[65] Then Mr Prater, at least at one time, used a system whereby the username of the operating system was "David Prater". That is the same username assigned to the operating system of the creator of the anonymous letter…

[68] On the basis of the metadata evidence I find on the balance of probabilities that Mr Prater created the anonymous letter. *I reach that conclusion while acknowledging Mr Hansen's evidence that it is possible for a person with an intermediate level of IT knowledge, to change the username assigned to an operating system*. (emphasis added)

[97] In *Commonwealth v. Davis Samuel Pty Ltd And Others (No 7)* [2013] ACTSC 146 (Supreme Court of the Australian), the court said:

[1164] *He pointed out that metadata can be manipulated*. His explanation, after considering the different scenarios, is that the document produced by Mr Allan Endresz was created by a process of interfering with the clock on the computer or the metadata …

[1191] Having carefully considered the evidence, *I cannot be satisfied on the balance of probabilities that the letter of 21 September 1998 was created and sent on that day, or that the letter of 1 October 1998 existed in the form that it was sent* prior to January 1999 (specifically, 15 January 1999) so as to be sent with the other letter to the lawyers for the Commonwealth on 22 January 1999. It is not necessary for this decision to make any further finding. (emphasis added)

[98] In *Boyapati And Others v. Rockefeller Management Corporation And Others* [2008] FCA 995 (Federal Court of Australia), the court said:

[99] In the end, Mr Macaulay's evidence **leads me to conclude that, in this case, the metadata cannot properly be regarded as reliable evidence supportive of either side's case**. Mr Macaulay said that determining the authenticity of the files recovered from the floppy disk can be "quite complex" and that he did not do it due to "complexity, and budget and time constraints". He was unable to exclude the possibility that someone had altered the metadata. He agreed that it was not always possible to determine whether or not this had occurred and, for this reason, the utility of metadata for determining authenticity was limited." (emphasis added)

[99] In *Croftcall Ltd v. Morgan And Another* [2008] All ER (D) 152 (Jul) (Chancery Division), the court said:

[82] In reaching this conclusion I have not been assisted by the expert evidence which was called on each side on this issue. The reason for this is that the expert evidence was ultimately inconclusive. *The experts agreed that the file was created on a computer with its time clock set at the date and time stated in the relevant "metadata", but also agreed that the timing of the clock could*

A *have been changed without undue difficulty*. There were various discrepancies in the different versions of the file which the experts had examined, but those discrepancies might have had an innocent explanation, and neither expert had been permitted to examine the hard drive of Mr Morgan's computer, which was the only way in which a reliable conclusion might have been reached about the authenticity of the file creation dates.
B (emphasis added)

[100] In *Yitai (Shanghai) Plastic Co, Ltd v. Charlotte Pipe and Foundry Co* [2021] SGHC 198 (Singapore High Court), the court said:

[61] In addition, I do not think that the metadata of the photographs
C restores their credibility. Mr Wang says that the metadata confirms the date on which they were taken. *In his affidavit, Mr Diggs states that the date and time at which an image is taken, as recorded in its metadata, can be easily amended. He exhibits four screenshots illustrating how this can be done in respect of a photograph shot on an iPhone. The applicant challenges this portion of Mr Diggs's evidence by highlighting that he is not an expert witness. However, I am not prepared*
D *to discount Mr Diggs's evidence entirely*, especially because the photographs adduced by the applicant below were not accompanied by any metadata ... (emphasis added)

[101] In *A Labour Inspector of The Ministry of Business, Innovation And Employment v. Basra & Khella Ltd* (New Zealand – BC202064023), the court
E said:

[117] However, it appears that time metadata is set from the system time which the device taking the photo is set at. Mr Fitness provided a demonstration during the investigation meeting using his iPhone. He changed the date on his phone backwards to a 2018 date, took a photo
F using the phone and then showed counsel and the Authority that the image metadata showed the picture of the Authority meeting as having been taken on that 2018 date.

[118] *Having seen that demonstration I conclude that the time could be changed on the device before taking the photo to make the metadata reflect the changed, and thus not accurate, time*. (emphasis added)
G

[102] In conclusion, I am of the view the expert findings of PW3, PW4 and DW3 show that the metadata properties of the MACC.docx have little to no value in proving the authorship and publication of the MACC.docx as it cannot identify the person who typed and or published the poison pen letter.

H The pleaded case of the plaintiff is that the late second defendant has a motive to harm the plaintiff. Not the first defendant.

The Law

[103] In deciding whether a defendant is responsible for an anonymous
I defamatory publication, the cases show that a critical evidence is whether the defendant had some motive to harm the plaintiff. The courts will test the evidence against two propositions; that the defendant had some motive to

harm the plaintiff and that the person responsible may have been a third party. (*Maui Ashley Solomon v. David James Prater* [2021] NZHC 481 (High Court, New Zealand)).

[104] In *Maui Ashley Solomon v. David James Prater* [2021] NZHC 481 (High Court, New Zealand), the court said:

> [42] The issue in common to these three decisions was whether the defendant was responsible for the defamatory publication. The cases show that, although the evidence varies depending upon the context, **the courts tend to test the evidence against two propositions: that the defendant had some motive to harm the plaintiff and that the person responsible may have been a third party**. In this proceeding Mr Solomon has put before the Court extensive evidence to show Mr Prater's role in, if not his sole responsibility for, the publication of the anonymous letter ... (emphasis added)

Application To Facts

[105] In the instant case, the plaintiff has not asserted or proven the first defendant's directors had a motive to harm the plaintiff.

[106] Instead, the plaintiff said it is the late second defendant who had the motive to harm the plaintiff. (Closing submission para. 101).

[107] In his amended statement of claim (encl. 37), he also pleaded that the late second defendant had access to, and was privy to the matters outlined in the poison pen letter.

[108] The plaintiff has also pleaded that the late second defendant was unhappy and dissatisfied with him, thereby possessing a motive and opportunity to write and publish the poison pen letter. (However, it should be noted all of these allegations remain unproven due to the discontinuance of his suit against the late second defendant.):

> *Amended Statement of Claim [Enclosure 37]*
>
> 23 (b) *at the material time of the publication and circulation of the poison pen letter (ie, on or about 28 September 2018), the second defendant was in the employ of the first defendant where the second defendant had access to the first defendant's facilities including the first defendant's computers and was also provided with a company computer by the first defendant*;
>
> (c) during the time of the second defendant's employ with the AIAC, the second defendant reported directly to the plaintiff and had wide access to and was privy to information and documents relating to the AIAC and the plaintiff, confidential and otherwise – matters of which include those outlined in the poison pen letter, *albeit* presented therein in a manner which is completely untrue, malicious, false, inaccurate, misleading, baseless and calculated to disparage the plaintiff;
>
> (d) in or about February 2018, the second defendant tendered his notice of resignation from the AIAC. In this respect, the second defendant left the AIAC and the plaintiff on bad terms, due to the following:

(i) When the second defendant was not given a promotion and/or a raise in mid-2017 by the AIAC, the second defendant became disinterested in his work and underperformed in his day-today tasks;

(ii) The second defendant also took objection to the appointments of Illia Putin as Deputy Head of Legal of the AIAC and Harald Sippel as the Head of Legal of the AIAC in late-2017, both of whom the second defendant now had to report to. The plaintiff contends and shall contend that the second defendant's unhappiness and/or dissatisfaction stemmed from the second defendant's belief that he would be appointed to either one of the two roles;

(iii) For the above reasons, *the second defendant was unhappy, dissatisfied and/or angry with the plaintiff* and the then Deputy director of the AIAC, Smrithi Ramesh.

(e) On 14 April 2021, *the plaintiff's solicitors issued a letter to the directors of the first defendant, expressing their intention to pursue the second defendant for defamation* and requesting – *inter alia* – confirmation of particulars relating to the second defendant's employment with the first defendant and access to the second defendant's computer(s) during the second defendant's employ with the first defendant …

(emphasis added)

[109] I also note that on 13 November 2018, the plaintiff's expert forensic analysis by PW3 Akash Rosen a/l Ramkalaish had already found "Leaderonomics" in the metadata of the Microsoft Word copy of the poison pen letter. (Notes of proceedings p. 90 line 21 and p. 91 line 2).

[110] It is significant that after the said finding by PW3 Akash Rosen a/l Ramkalaish, the statements of the plaintiff and his solicitor's pre-litigation to the first defendant, show that it is the late second defendant, (And not the first defendant), who the plaintiff says wrote and published the poison pen letter against the plaintiff. (Bundle B common bundle of documents pp. 402 to 414).

[111] In fact, prior to the filing of this suit the plaintiff's solicitors wrote a letter to the directors of the first defendant *ie*, Ang Hui Ming/DW1 and Roshan Thiran a/l Nyanen Thiran/DW2 dated 14 April 2021 (bundle B common bundle of documents pp. 67 to 68) stating that:

(i) the report by its digital forensic expert indicated that the author and publisher of the poison pen letter was "Leaderonomics". (Paragraph 2c of letter).

(ii) the plaintiff believes the second defendant was the main author of the poison pen letter as he was an ex-employee of the AIAC and was privy to information in the poison pen letter. (Paragraph 2d of letter).

(iii) the plaintiff intends to pursue the second defendant for authorship and publication of the poison pen letter. (Paragraph 3a of letter). A

(iv) the plaintiff would like access to the second defendant's Leaderonomics laptop to look for the poison pen letter. (Paragraph 3i to vi of letter).

[112] To conclude on this point, based on the evidence set out above, the plaintiff and his experts themselves believe the finding of "Leaderonomics" in the metadata of the Microsoft Word copy of the poison pen letter does not mean the first defendant is the publisher of the poison pen letter. B

[113] I now move on the consider the plaintiff's second ground of presumption why the first defendant is the publisher of the poison pen letter. C

Plaintiff's Second Ground – By Invoking The Presumption Under Section 114A(3) Of The Evidence Act 1950 Against The First Defendant

The law

[114] Section 114A(3) of the Evidence Act 1950 reads as follows: D

> 114A Presumption of fact in publication
>
> (1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved. E
>
> (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved. F
>
> (3) *Any person who has in his custody or control any computer on which any publication originates from is presumed to have published* or re-published *the content of the publication unless the contrary is proved.*
>
> (emphasis added) G

[115] The leading case in Malaysian on "s. 114A(1) Evidence Act 1950" is *Peguam Negara Malaysia v. Mkini Dotcom Sdn Bhd & Anor* [2021] 3 CLJ 603 (Federal Court). This case is cited by the plaintiff's counsel. Other cases cited by the plaintiff's counsel are *Thong King Chai v. Ho Khar Fun* [2018] 1 LNS 374; [2018] 5 MLRH 277 (High Court) Faizah Jamaludin JC; *Small Medium Enterprise Development Bank Malaysia Bhd v. North South Speed Sdn Bhd & Ors & Another Case* [2020] 1 LNS 1724; [2020] MLJU 1991, Faizah Jamaludin J; *Ifcon Technology Sdn Bhd & Ors v. Luqmanul Hakim Abd Rahim* [2022] 1 LNS 1533; [2023] 1 MLRH 102 (High Court) and *Stemlife Bhd v. Mead Johnson Nutrition (Malaysia) Sdn Bhd & Anor* [2013] 1 LNS 1446 (High Court). All these cases are on s. 114A(1) of the Evidence Act 1950. H I

[116] However, the presumption invoked by the plaintiff in our case is s. 114A(3) of the Evidence Act 1950 and not s. 114A(1) of the Evidence Act 1950. Thus, the cases cited by the plaintiff are all not relevant.

[117] The pertinent issue in our case is what is the material time for custody or control of the computer for the presumption under s. 114A(3) of the Evidence Act to apply to a defendant.

[118] In response to my question, "For the presumption under s. 114A(3) Evidence Act to apply to a person what is the material time for custody or control of the computer?", counsel for the plaintiff replied that material time is both the time of publication as well as during trial. But counsel candidly admitted that he had no cases to support his answer.

[119] Counsel for the first defendant said material time is the time of publication.

[120] In my view, the presumption under s. 114A(3) of the Evidence Act can be invoked against a defendant who has custody or control of the computer at any point in time as long as the publication originates from that computer.

[121] This interpretation is in accord with the decisions in *PP v. Razis Awang* [2020] MLJU 132 and *Ahmad Abd Jalil v. PP* [2015] 5 CLJ 480; [2014] MLJU 1938.

[122] On this interpretation, the presumption of publishing can be rebutted by a defendant showing he does not have custody or control of the computer at the material time of the publication of the defamatory email.

Application To Facts

[123] The first defendant has proven that the second defendant had custody or control of the laptop at the time of his alleged publication of the poison pen letter. See the testimonies of Ang Hui Ming [DW1] and Roshan Thiran a/l Nyanen Thiran [DW2].

[124] Further, the plaintiff himself says the second defendant had custody or control of the laptop used to publish the poison pen letter. (See plaintiff's solicitors' letter to the directors of the first defendant dated 14 April 2021 – bundle B common bundle of documents pp. 67 to 68).

[125] The plaintiff himself also pleaded in his amended statement of claim that the second defendant had custody or control of the laptop used to publish the poison pen letter. (Amended statement of claim para. 23e).

[126] It is my view the first defendant has successfully rebutted the presumption of publication under s. 114A(3) of the Evidence Act 1950.

[127] If more evidence is needed, I need only refer to the fact that on 14 April 2021, the plaintiff's solicitors issued a letter to the directors of the first defendant, expressing their intention to pursue the late second defendant for defamation and requesting – *inter alia* – confirmation of particulars relating to the second defendant's employment with the first defendant and access to the second defendant's computer(s) during the second defendant's employment with the first defendant. (Bundle b common bundle of documents pp. 67 to 68).

[128] I will now proceed to consider agreed issue [ii].

Agreed Issue [ii]

Whether The Plaintiff Is Entitled To The Relief Sought Against The First Defendant In The Amended Writ Of Summons Dated 28 December 2021 [Enclosure 1] And The Statement Of Claim Dated 30 December 2021 [Enclosure 2]

[129] In view of my finding that there is no publication of the poison pen letter by the first defendant, agreed issue [ii] has to be answered in the negative.

Decision

[130] For the reasons above, I dismiss the suit against the first defendant with costs.

[131] I order the plaintiff to pay costs of RM50,000 to the first defendant subject to allocator.

[132] Lastly, I thank counsel for the parties for their submissions which had greatly assisted me.